ANDY BESHEAR
GOVERNOR

REBECCA W. GOODMAN
SECRETARY

ANTHONY R. HATTON
COMMISSIONER

ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION

300 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601
TELEPHONE: 502-564-2150
TELEFAX: 502-564-4245

February 27, 2023

Daniel Blackman, Regional Administrator
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street SW
Atlanta, GA 30303

Re: Comments relating to *Implementing Regulations under 40 CFR Part 60 Subpart Ba Adoption and Submittal of State Plans for Designated Facilities*; Docket ID: EPA-HQ-OAR-2021-0527

Dear Mr. Blackman,

On behalf of the Commonwealth of Kentucky and the Energy and Environment Cabinet, the Division for Air Quality (Division) respectfully submits the following comments relating to the United States Environmental Protection Agency's (EPA) proposed action in the December 23, 2022 Federal Register, soliciting comments on the proposed *Implementing Regulations under 40 CFR Part 60 Subpart Ba Adoption and Submittal of State Plans for Designated Facilities*.[1]

The Division disagrees with EPA's proposed changes as outlined in the proposed rulemaking. The deadlines EPA establishes are impractical and unattainable. The requirements for remaining useful life and other factors (RULOF) have made the statutorily allowed considerations a cumbersome process that will be prohibitive. Additionally, this provision is hidden in a rulemaking made specifically for states and local agencies, of which designated facilities may not have been aware and unable to provide comment. The new requirements for 'meaningful engagement' with 'pertinent stakeholders' are burdensome and will require additional state resources.

[1] 87 Fed. Reg. 79,176 (Dec. 23, 2022).

The Division appreciates EPA's consideration of the attached comments. If you have questions or comments, please contact me at, Michael.Kennedy@ky.gov, at your convenience.

Sincerely,

Recoverable Signature

X Michael Kennedy

Signed by: Michael Kennedy

Michael Kennedy, Director
Kentucky Division for Air Quality

Kentucky Comments regarding the December 23, 2022 proposed rule Implementing Regulations under 40 CFR Part 60 Subpart Ba Adoption and Submittal of State Plans for Designated Facilities

Electronic submittal

The Kentucky Division for Air Quality (Division) supports using SPeCS or a similar system to submit state plans. The Division recommends adding language to clarify that a Negative Declaration letter submitted in accordance with 40 CFR 60.23a(b) can also be submitted via SPeCS.

Proposed Timelines

The Division disagrees with EPA's proposed state plan timelines within this proposal. First, the Division disagrees with the approach EPA is taking in proposing new timelines. The court faulted EPA for not considering the impact of the timelines associated with the original Ba proposal (3 years) and justification of those timelines. In this proposal, EPA is again not justifying the timelines they are proposing. The Division suggests that, as opposed to providing new timelines in this proposed rule, EPA provide justification for the timelines that were originally proposed as part of Ba. EPA appears to be choosing timelines that will not be challenged and potentially remanded by the court, instead of justifying the chosen timelines as the court faulted EPA for not fully considering potential impacts to public health and welfare.[1]

The Clean Air Act (CAA) states that the timelines should be similar to Section 110 timelines. In accordance with CAA Section 111(b), the EPA establishes emissions standards for any category of new and modified stationary sources that in the Administrator's judgment "…causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Section 109 of the CAA is for promulgating national ambient air quality standards for criteria pollutants which are known to have an impact on public health. Section 110 of the CAA established the deadlines for State Implementation Plans (SIPs). Based on this language, and the clear distinction between the known health effects of criteria pollutants and the anticipated health effects of designated pollutants, the Division disagrees with EPA's decision that state plans should have shorter deadlines than SIPs under CAA Section 110.

The 15-month timeline allotted for states to submit a state plan is completely unrealistic and unachievable. A minimum of 24 months is necessary for states to develop and submit a state plan, especially if EPA maintains the 'meaningful engagement' provisions of this proposed rule (This assumes that EPA does indeed provide states with a model rule to use as part of regulatory and state plan development.). The state would be required to conduct 'meaningful engagement' in both the development of regulations necessary for the state plan, and for the overall state plan itself. The regulatory process in Kentucky is a minimum of 12 months. With only 15 months allowed, the state would not be able to conduct 'meaningful engagement', promulgate regulations, public notice the state plan, respond to public comment, and finalize the state plan

[1] 87 FR 79183

for submittal to EPA. The Division recommends that EPA consider a minimum of 24 months for state plan development, with additional time allowed for emission guidelines (EGs) that 1) do not contain a model rule, 2) impact a large number of designated facilities, 3) have a statewide applicability such that designated facilities are spread across the state and meaningful engagement will be more robust, or 4) impact designated facilities which will need to consider remaining useful life and other factors (RULOF).

Additionally, the 15-month timeline is based on EPA's evaluation of PM National Ambient Air Quality Standard (NAAQS) submittals under CAA Section 189, which is not appropriate. CAA Section 111 does not ever direct EPA to look to CAA Section 189 and adopt similar timelines. EPA states, "the difference in complexity between the CAA section 189 plan requirements and the CAA section 111(d) plan requirements suggests that a timeline shorter than 18 months is more appropriate for development of CAA 111(d) state plan submissions."[2] The Division disagrees with EPA's assumption about the complexity of these plans. EPA is clearly not taking into consideration the requirements for meaningful engagement or RULOF as proposed in this rulemaking.

The preamble states, "It is reasonable to permit at least 4 to 7 months for evaluation of the comments received, any necessary technical analysis, decision-making, and drafting and reviewing of the final action."[3] The Division recommends EPA acknowledge that this same amount of work and time is necessary for the state in state plan development, and not just for EPA when developing a federal plan. In fact, states are likely to need twice as much time for these actions, as they will need two separate, distinct sets for the regulatory process and the state plan development process.

The Division appreciates that EPA acknowledges there are multiple pathways to establishing enforceable requirements as part of the state plan, including regulatory development, agreed orders, and permits. However, the Division's experience is that the regulatory pathway is the most appropriate for state plans impacting multiple sources, as this provides for certainty and consistency.

The Division suggests that EPA build in an option for states to apply for an extension for the deadline to submit the state plan, if the state can show progress in state plan development.

EPA's proposal to require increments of progress if final compliance is more than 16 months from the date of state plan submittal is inappropriate.[4] The Division recommends 24 months.

[2] 87 FR 79183
[3] 87 FR 79186
[4] 87 FR 79189

The Division cautions that the deadlines as proposed in this rulemaking, and the processes as outlined by EPA in the preamble to this proposed rule will work as a disincentive for states to draft state plans. If a state knows that the timeline is unachievable before ever getting started, then a state will likely decide to use staff time and resources to work on projects, permits, plans, regulations, etc. that are going to be fruitful. Further, EPA states, "Because 15 months is the generally expeditious period of time in which the EPA finds that most states can create and submit a plan per the EPA's corresponding…."[5] It is clear, based on this statement, that EPA ***knows*** that there are states that will not be able to meet this deadline. However, EPA offers no options for those states to be able to submit a plan.

While the Division disagrees with the proposed "state plan call", the Division recommends that if EPA finalizes 'state plan call' provisions, the amount of time needed is longer than 12 months.[6] EPA argues this is a reasonable amount of time for public outreach and state processes. The Division believes that while the state plan call may be specific to one source or a subcategory of sources, the requirements from the state are the same, and a minimum of 24 months will be necessary if there is a model rule and RULOF is not taken into consideration. EPA's assertion that the process is otherwise less onerous is inaccurate.

State plan revisions under 60.28a(a) need the same amount of time (24 months minimum; dependent on EG) as a state plan submittal. The revision has to go through the same process as the original plan, including meaningful engagement.

Remaining Useful Life and Other Factors

The Division believes that the proposed regulatory text as it applies to RULOF is inappropriate as part of this rulemaking. This rulemaking is specific to state plans and state plan submittal requirements. The RULOF language is buried in this proposal in a way that does not allow for meaningful comment from designated facilities who may need to make use of RULOF in future EGs. The Division recommends these specific provisions be more appropriately placed in the specific EG for which they apply and not in Ba. This will allow affected designated facilities and states the opportunity to evaluate the RULOF requirements specific to the source category.

Additionally, the Division finds the RULOF requirements as part of this proposed rule to be prohibitive. The state (and designated facilities) will have to spend an exorbitant amount of time and resources to evaluate RULOF as described in this proposal. This will be impossible to do with the proposed timing of 15 months for state plan development. Instead of allowing for RULOF as the statute intends, this proposal makes use of RULOF onerous and burdensome, and impossible to use in practicality.

[5] 87 FR 79184
[6] 87 FR 79195

The proposed rule text in 40 CFR 60.24a(f)(1) requires a source-specific best system of emission reduction (BSER) by identifying all control technologies. The Division disagrees that such an analysis would be necessary if the designated facility is proposing a different standard due to remaining useful life. It is unclear how (f), (h), and (i) work together in the proposed regulatory text. The EPA needs to specify how a state incorporates a retirement date into an enforceable requirement.

The Division disagrees with EPA making the determination for the outermost retirement date for which a designated facility could take remaining useful life into consideration.[7] The Division also disagrees that EPA may define the timeframe for 'imminent retirement' for purposes of the standard being business-as-usual (BAU). This date may change drastically depending on source category as well as specific scenarios for a given designated facility. A designated facility should not be prohibited from being able to use RULOF simply because they do not fall into a pre-determined timeframe established by EPA.

The Division recommends, as previously stated, that EPA allow for additional state plan development in EGs where states and designated facilities want to use RULOF provisions for an alternative emission standard.

EPA states, "The optionality, rather than mandate, for states to account for RULOF further supports the notion that this provision is not intended to undermine the presumptive level of stringency in an EG for the source category."[8] The Division agrees that it is an option, not a mandate, and as such believes this language also clearly shows that it is intended to mean that the stringency levels were not meant to unduly burden designated facilities with a short foreseeable future of operation. RULOF is not meant to be a burden to designated facilities who want to use it, even if EPA is making it prohibitive as part of this proposed rulemaking.

In the preamble to this proposed rulemaking, EPA states, "RULOF is appropriately applied to permit states to address instances where the application of BSER factors to a particular designated facility is fundamentally different than the determinations made to support the BSER and presumptive level of stringency in the EG."[9] For some specific source categories, RULOF is going to be specifically about remaining useful life, and the Division disagrees that the designated facilities should need to leave stranded assets simply because it 'can' install controls and apply BSER even if its retirement date is within 5 years and those assets have not paid for themselves.

---

[7] Memorandum from Michelle Bergin, Physical Scientist, U.S. EPA to Docket ID No. EPA-HQ-OAR-2021-0527 regarding Redline/Strikeout for proposed amendments to 40 CFR 60 Subpart Ba: Adoption and Submittal of State Plans for Designated Facilities, Document Number EPA-HQ-OAR-2021-0527-0002, December 23, 2022; Page 9

[8] 87 FR 79197

[9] 87 FR 79197

The Division requests clarity from EPA on this language:

> "Note that the EPA considers the proposed RULOF provisions to apply in circumstances distinct from the flexible compliance mechanisms, such as trading and averaging, discussing in Section III.G.1 of this preamble. In other words, these provision would apply where a state intends to *depart* from the presumptive standards in the EG and propose a less stringent standard for a designated facility (or class of facilities), and not where a state intends to *comply* by demonstrating that a facility or group of facilities subject to a state program would, in the aggregate, achieve equivalent or better reductions than if the state instead imposed the presumptive standards required under the EG at individual designated facilities."[10]

The Division is concerned EPA intends that if a state uses RULOF for a designated facility, then other designated facilities in the state could not use averaging or trading. As proposed, it appears that the state is required to give each designated facility a standard of performance in accordance with an applicable EG. Then as compliance options, there may be state averaging or trading. The paragraph from the preamble is confusing, and leaves states wondering if application of RULOF then prohibits averaging or trading as compliance mechanisms.

EPA is proposing to require the state to determine and include, as part of the state plan submission, a source-specific BSER for the designated facility.[11] This is a heavy lift for a state agency, and will require substantial work, especially if there are multiple designated facilities that need to use RULOF. This is a perfect example of a time it would be necessary for EPA to allow states to have an extension on state plan development for these designated facilities.

EPA specifically seeks comment on whether factors for RULOF should be considered part of a presumptively approvable framework for applying a less stringent standard of performance, rather than requirements.[12] The Division cautions that a presumptively approvable framework does not guarantee certainty for the states or designated facilities.

When a designated facility has a known near-term retirement date, the Division supports EPA in the approval of "Business as Usual" as the appropriate standard of performance.

The Division requests EPA to clarify whether there is a need for additional meaningful engagement for RULOF if a designated facility is given BAU due to imminent retirement date.[13]

[10] 87 FR 79198
[11] 87 FR 79203
[12] 87 FR 79200
[13] 87 FR 79203

Actions by the Administrator

The Division disagrees that the Administrator should have the option to "amend" timelines for state plan submissions in 40 CFR 60.27a(a). There is no regulatory certainty for the state in state plan submittal if the Administrator can simply change the timeline as he deems necessary. As previously stated, the 15-month timeline is already too short, and any determination that it should be even shorter is even less practical to achieve.

The Division recommends that EPA allow for more than the 12 months for conditional approvals that relate to RULOF provisions.[14] Twelve months will not be enough time for states to revise state plans and perform additional analysis for RULOF.

The language in the proposed regulatory text of 40 CFR 60.27a(e)(2) implies that for the purposes of a federal plan, EPA is putting the burden of using RULOF on the owner/operator of a designated facility. It is unclear how a designated facility would even know to apply for such consideration since EPA has stated that the federal plan promulgation will begin immediately upon the state plan submittal due date. Unlike the SIP process, there is no process in Subpart Ba for the 'finding of failure to submit' which would typically start a FIP clock. Without such notification to both the state and potentially affected designated facilities, it is unfair for EPA to task them with the burden of applying for RULOF when they do not even know if there is a federal plan coming that may impact them.

EPA is remiss in proposing to require that "EPA take final action on a state plan or plan revision submission within 12 months after a plan is determined to be complete or becomes complete by operation of law."[15] EPA has proposed allowing only 15 months for a state to develop a state plan; but allows itself basically 14 months (2 months for administrative completeness and 12 months for remainder of plan) to review. This is inappropriate as the state plan development is a much heavier lift and the burden is on the state to submit an approvable state plan.

The Division disagrees with the administrator being able to issue 'error correction' mechanism without a notice to the state prior to such a finding. Kentucky has previously had a SIP approved only for EPA to issue an "error correction" stating it was not approved, and subjecting Kentucky to a FIP without explaining why there was an 'error'. While the preamble states, "the EPA expects it will work with states, as it has done previously in the SIP context, to correct any deficiencies in their plans."[16], states cannot trust that EPA actually follows through with this statement. States have recently seen EPA fail to take action on SIPs submitted in 2018 and 2019 until 2022, and EPA cites new data as a reason for disapproval of those SIP submittals. States were not notified by EPA prior to those deficiencies being published in the Federal Register.

[14] 87 FR 79194
[15] 87 FR 79185
[16] 87 FR 79196

Additionally, the language in the preamble gives the impression that EPA could approve RULOF and then later simply "change its mind" without warning to the state or to the designated facility.

The Division disagrees with the partial approvals and partial disapprovals.[17] As outlined in the preamble, it appears that EPA is simply providing a way to approve model rule provisions, and disapprove RULOF provisions.

The call for state plan revisions under 60.27a(i) is inappropriate. EPA should revise EGs and then have states do updated state plan revisions. EPA states, "a state would be required to submit a plan revision so that the state plan is substantially adequate to meet applicable requirements, such as by updating a provision affected by a court decision or by revising control measures to achieve the required emission reductions."[18] Again, EPA should update EGs and model rules instead of issuing a 'state plan call' and putting the burden on states.

Meaningful Engagement

From the proposed rule text:

> (k) *Meaningful engagement* means the timely engagement with pertinent stakeholder representation in the plan development or plan revision process. Such engagement must not be disproportionate in favor of certain stakeholders. It must include the development of public participation strategies to overcome linguistic, cultural, institutional, geographic, and other barriers to participation to assure pertinent stakeholder representation, recognizing that diverse constituencies may be present within any particular stakeholder community. It must include early outreach, sharing information, and soliciting input on the state plan.[19]
>
> (l) *Pertinent stakeholders* include, but are not limited, to industry, small businesses, and communities most affected by and/or vulnerable to the impacts of the plan or plan revision.[20]

The EPA specifically solicits comment on how much additional time 'meaningful engagement' will take as part of the state plan.[21] The Division recommends that EPA consider a minimum of 8 months for public engagement, as part of the regulatory process, and as part of the state plan

[17] 87 FR 79193
[18] 87 FR 79195
[19] Memorandum from Michelle Bergin, Physical Scientist, U.S. EPA to Docket ID No. EPA-HQ-OAR-2021-0527 regarding Redline/Strikeout for proposed amendments to 40 CFR 60 Subpart Ba: Adoption and Submittal of State Plans for Designated Facilities, Document Number EPA-HQ-OAR-2021-0527-0002, December 23, 2022; Page 4.
[20] Memorandum from Michelle Bergin, Physical Scientist, U.S. EPA to Docket ID No. EPA-HQ-OAR-2021-0527 regarding Redline/Strikeout for proposed amendments to 40 CFR 60 Subpart Ba: Adoption and Submittal of State Plans for Designated Facilities, Document Number EPA-HQ-OAR-2021-0527-0002, December 23, 2022; Page 4.
[21] 87 FR 79184

process. As previously stated, the Division recommends EPA adjust state plan deadlines based on the number of designated facilities in a state and the amount of time that meaningful engagement will take as this number increases.

The preamble states, "Many states provide for notification of public engagement through the internet, however there cannot be a presumption that such notification is adequate in reaching all those who are impacted by a CAA section 111(d) state plan and would benefit the most from participating in a public hearing."[22] Additionally, EPA goes on to state that some people do not go online or have internet access, but does not state specifically what a state should do instead. EPA makes suggestions including 'notice through newspapers, libraries, schools, hospitals, travel centers, community centers, places of worship, gas stations, convenience stores, casinos, smoke shops, etc."[23] There is no clear line in the sand as to what is expected and what is approvable. The Division requests that EPA issue specific guidance for meaningful engagement requirements that states can follow for state plan approvability.

The EPA solicits comment on how meaningful engagement applies to pertinent stakeholders outside the borders of the state.[24] 40 CFR 60.23a(d)(5) already requires notification to other states in an interstate region. There is nothing in CAA Section 111 that speaks to interstate transport in the same manner that CAA Section 110 requires. The Division recommends that the interstate notification requirements are sufficient to provide meaningful engagement.

EPA is allowing for alternative meaningful engagement.[25] The Division recommends EPA still approve states cancelling public hearings if no one requests a hearing to be held so they may provide oral comment. Cancelling a public hearing does not mean the state has not had meaningful engagement.

Miscellaneous Comments

The Division suggests EPA include a definition of final emission guideline. This term is used in the applicability, and a definition would provide clarity.

The preamble states the proposed rulemaking is for EGs finalized after July 8, 2019. It also states that Ba is for future EGs. However, the proposed rule text deletes all references to "subpart C of this part". Removing this language means that it would apply to all EGs in 40 CFR Part 60, including those for incinerators. The Division suggests leaving the "subpart C" language and adding language to be clear that incinerator EGs would not have to meet Ba requirements.

[22] 87 FR 79191
[23] 87 FR 79192
[24] 87 FR 79192
[25] 87 FR 79192

In 40 CFR 60.27a(g)(1), EPA needs to clarify that a state plan that does not meet the minimum criteria does not constitute an immediate promulgation of a federal plan unless the state plan deadline has passed. Additionally, in the preamble, EPA states that after the state submission deadline passes, EPA is not required to take action on a state submission and can promulgate a federal plan. While the Division agrees that EPA can promulgate the federal plan, the Division disagrees that EPA does not have to take action on the state plan submittal. As outlined in 60.27a(g), the Administrator has to make determinations, regardless of whether it is past the state plan deadline submittal or not. The Division recommends EPA add language regarding a "finding of failure to submit" in order for both states and designated facilities to know that a Federal Plan is the next step. This action would allow states to submit extension requests to EPA and provide updates regarding state plan status. Otherwise, EPA may begin working on a federal plan but get a state plan submitted prior to finalizing. This is a waste of resources for EPA.

The Division recommends EPA specify that if EPA provides a model rule for an EG, and the state plan adopts the model rule, the demonstration required in 60.27a(g)(3)(iv) has been met.

The Division agrees with EPA's proposal to "determine that, under appropriate circumstances, the EPA may approve state plans that authorize sources to meet their emission limits in aggregate, such as through standards that permit compliance via trading or averaging."[26] However, the Division disagrees with EPA's conclusion that CAA Section 111 does not limit the BSER to controls that can be applied at and to the source. The Division acknowledges that there are different circumstances for using BSER to determine an appropriate standard, and allowing for averaging or trading as a compliance option. The Division disagrees that BSER can be beyond the control of the source, as that is no longer considered BSER for the source itself.

"The EPA notes that an EG may also specify aspects of the demonstrations that require certification from third-party industry experts…"[27] The Division requests clarity on who pays for such required certifications.

The Division cautions that state air agency staff are NOT health professionals. "The EPA is proposing to require that, to the extent a designated facility would qualify for a less stringent standard through consideration of RULOF, the state, in calculating such a standard, must consider the potential health and environmental impacts and potential benefits of control to communities most affected by and vulnerable to the impacts from the designated facility considered in a state plan for RULOF provisions."[28] The Division simply does not have the expertise to evaluate these potential impacts.

[26] 87 FR 79181
[27] 87 FR 79202
[28] 87 FR 79203